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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1002

TAYLOR'S WELDING SERVICE, INC., ET AL.,
Petitioners,

versus

DAVID M. BELL,
Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

MEMORANDUM OF PETITIONERS IN SUPPORT OF TIMELY FILING OF APPLICATION FOR WRIT

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MAY IT PLEASE THE COURT:

STATEMENT

The Supreme Court of Louisiana on October 24, 1974, denied applications of all parties for writs of certiorari or review to be directed to the Court of Appeal, Third Circuit, State of Louisiana, which Court had rendered judgment completely in favor of petitioners, Taylor's Welding Service, Inc., et al and against respondent, David M. Bell.

On or about January 20, 1975, respondent Bell filed with this Court a petition for a writ of certiorari. The application bears No. 74-889. This petition was filed on the 88th day of the ninety days allotted for such a filing. 28 USC 2101(c); Rule 22. Notice of the filing was received by the undersigned attorney of record for petitioners on or about January 20, 1975, and by another attorney of record for one of petitioners on January 23rd, 1975. On January 24, 1975, undersigned counsel mailed to the Clerk of Court a petition requesting additional time to file a petition for an alternative writ of certiorari; on February 3, 1975, the Honorable Lewis F. Powell, Jr. signed an order granting petitioners through February 6, 1975 to file a petition for a writ of certiorari without prejudice to the Court's consideration of whether the application had been timely filed (No. A-631); petitioners' application for a writ of certiorari was filed on February 6, 1975 (No. 74-1002).

QUESTION PRESENTED

May a litigant, which has obtained a final state court judgment completely in its favor apply for an alternative or cross writ of certiorari after the lapse of ninety days from the date of the judgment to review questions not raised by the petition of certiorari filed very late in the ninety day period by the litigant against whom the judgment was rendered?

ARGUMENT

With the final judgment of the Supreme Court of Louisiana completely in their favor, petitioners had

no occasion to act until copies of the application of David M. Bell in No. 74-889 were received on the 88th and 91st day following the final judgment of the Supreme Court of Louisiana. Up until that time the filing of an application for a writ of certiorari by undersigned counsel would have been a disservice to the petitioners: It would have been a vain and useless thing because the final judgment of the Supreme Court of Louisiana was completely in favor of petitioners. It may have had the effect of alerting respondent to file a petition for a writ of certiorari and thus expose petitioners to unnecessary litigation; petitioners would have been unnecessarily burdened with substantial legal fees and moderate court costs.

Under the foregoing circumstances, counsel suggests that a logical, fair and equitable interpretation of 28 USC 2101(c) carried over verbatim for all practical purposes into Rule 22, paragraph 1, is that the final sentence reading "a Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days," was designed precisely to take care of the instant situation. Prior to a move by respondent, David M. Bell, petitioners had no cause to file; a cause did arise, and certainly a good one, when respondent David M. Bell filed his application for a writ of certiorari on the 88th day.

We further submit that the issue is not jurisdictional because the only limitation placed on the right to a sixty day extension for good cause shown is not statutory but that of the Court — Rule 34, paragraph 2, which states that applications for extension of time to file

petitions for certiorari shall be submitted at least ten days before the expiration of the period sought to be extended.

Your Honors on a number of occasions have granted petitions for writs of certiorari that were filed after the ninety day period. This Court in two cases has granted such applications in situations identical to those at bar. In Brotherhood of Railroad and S.S. Clerks vs. Florida East Coast Railroad Co., 382 US 1008, 86 Sup. Ct. 615, 15 L. Ed. 2d 524, the Government toward the very end of the ninety day delay filed an application for extension of time to file its petition for certiorari and an extension was granted; more than ninety days after the final judgment of the Court below, the Railway which had intended to petition for certiorari in the case *only in the event that the Government did so*, applied for a modification of the extension of time previously granted to the Government so as to include all parties in the matter; separate petitions for certiorari were then filed by the Government, the Railway and the Unions; the Court granted all of the petitions and subsequently judgment was affirmed on the merits.*

Your Honors in Pierson vs. Ray, 384 US 938, 86 Sup. Ct. 1457, 16 L. Ed. 2d 537, entertained a cross-petition for certiorari filed approximately 120 days after the final judgment of the lower Court when there had been no request for any extension of time to file such petition. The cross-petition requested that *in the*

* These facts are not stated in the reported cases, however, undersigned counsel has been informed that the facts are in the records of the cases.

event the main petition for certiorari were granted, then certiorari should be also granted to review a further question not raised by the main petition for certiorari but on which the respondent wanted review. The Court considered the main petition and cross-petition and subsequently decided both on the merits.*

CONCLUSION

We submit that the petition of Taylor's Welding Service, Inc., et al was timely filed and that in the event the Court should grant the main petition for certiorari in number 74-889, the Court then should grant this petition for certiorari so to consider at one and the same time all of the matters raised by both petitions.

Respectfully submitted.

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* See *supra*, p. 4.

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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that I have this day served upon each attorney for the petitioner herein, Glenn Alexander of Jones & Jones, Post Office Box M, Cameron, Louisiana and Robert M. McHale, 1901 Oak Park Boulevard, Lake Charles, Louisiana three copies of the foregoing memorandum in support of the timely filing of petitioners' application for writ of certiorari by mailing the same to each of the said attorneys of record at Lake Charles, Louisiana this ____ day of April, 1975.

_____

FRANK M. BRAME